In The

Supreme Court of the United States

October Term, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL, et al.,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE

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August 6, 1975

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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AMENDMENT TO THE BRIEF OF THE
AMERICAN JUDICATURE SOCIETY
AS AMICUS CURIAE

1. Strike from the second full paragraph of page 22;

> The experiences of Nebraska and Oklahoma also suggest that it is possible to provide lawyer judges even in states which have large areas with low population.

Insert in its place:

> The experience of Nebraska also suggests that it is possible to provide lawyer judges even in states which have large areas with low population.

2. Strike from the second full paragraph of page 22:

> Oklahoma allows a non-lawyer to be certified as a Special Judge only when no lawyer candidate for the judgeship can be found. In all of Oklahoma, there is only one non-lawyer Special Judge. See Appendix, *supra*.

3. Strike from pages 11a and 12a the entire section on "Oklahoma", as follows:

OKLAHOMA

(Information acquired from Marian Opala, Administrative Director of the Courts)

Oklahoma law requires bar membership for eligibility for a judgeship. Okla. Const. art. 7, §2 (supreme court); Okla. Const. art. 7, §3 (court of criminal appeals); Okla. Stat. Ann. tit. 20, §30.9 (1962) (intermediate court of appeals); Okla. Const. art.7, §8(g) (district court). Oklahoma law provides specially for any occasion when a lawyer candidate for a district court judgeship cannot be found that a non-lawyer may be appointed as a Special Judge. Okla. Const. art 7, §8(h). The criminal jurisdiction of the non-lawyer Special Judge is limited to misdemeanors punishable by small fines and/or incarceration up to 30 days unless the Special Judge has the written consent of all the parties to hear the case. 20 O.S. 1972, §123 (1974).

In spite of the fact that much of Oklahoma is sparsely populated, only one of Oklahoma's 203 judges is a non-lawyer judge under the Special Judge provision. Okla. Const. art. 7, §8(h).

The professionalization and unification of Oklahoma's court system replaced 240 non-lawyer judges in courts of limited jurisdiction with 44 lawyer magistrates. In spite of the reduction in personnel, the transition was smooth and there was no disruption of law enforcement.

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BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS AMICUS CURIAE

The American Judicature Society files this Brief Amicus Curiae pursuant to the written consent of the parties submitted herewith.

INTEREST OF AMICUS CURIAE

The American Judicature Society, hereinafter called the Society, is a private, non-profit membership organization founded in 1913 and dedicated to promoting the effective administration of justice. Among the Society's membership are federal and state judges, leaders of the organized bar, and practicing lawyers, law teachers, government officials and civic leaders.

The Society's activities embrace research in the area of judicial administration, publication of JUDICATURE (the journal of the American Judicature Society) and other materials, conducting state and national conferences on court modernization, and maintenance of an information and consultation service. The Society pioneered in promoting improvement of judicial administration through reforms such as unified court systems, judicial councils, bar unification, the non-partisan merit plan for selecting judges, and adequate judicial compensation.

The Society has long emphasized that ultimately the key to sound judicial administration and effective court organization is a professional, full-time judiciary, wherein all trial court judges possess law degrees and are members of the bar. The Society and its members also believe that each citizen is entitled to equal justice under law. In the case at bar the Court of Appeals of Kentucky has sanctioned a judicial system whereby non-lawyer judges are authorized to preside over criminal trials and empowered to incarcerate. See Jurisdictional Statement of Appellant, pp. 3-4 and Opinion of the Court of Appeals of Kentucky in *North* v. *Russell*, (Ky., March 21, 1975), set out in Appendix 1 of

Appellant's Jurisdictional Statement. It is our contention that such a system violates the due process clause of the Fourteenth Amendment to the United States Constitution and undermines the effective administration of justice.

The entire issue is of vital concern to members of the Society. The Society urges reversal of the judgment of the Court of Appeals of Kentucky because we believe that at the core of our system of justice is the protection and preservation of an individual's freedom. There are compelling reasons why non-lawyer judges should not be permitted to perform judicial functions in proceedings which affect the liberty of the accused.

In view of the direct importance of this case nationally, the Society's executive committee has authorized and instructed the Society's staff to prepare and file an amicus brief in this case.

OPINION BELOW

The Opinion of the Court of Appeals of Kentucky decided March 21, 1975, currently is unreported. It is set out in Appendix 1 of Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdiction of this Court to review by appeal the judgment of the Court of Appeals of Kentucky is conferred by 28 U.S.C. §1257(2). Probable jurisdiction was noted on June 23, 1975.

STATUTORY PROVISIONS INVOLVED

The relevant Kentucky statutory provisions are Sections 26.010, 26.140, 26.150(1) and 26.200 of the Kentucky Revised Statutes (1971). The relevant Kentucky constitutional provision involved is Section 130 of the Kentucky Constitution. The statutory and constitutional provisions are set out in full in Appellant's Jurisdictional Statement, at pp. 5-7.

QUESTIONS PRESENTED

I. Whether Kentucky's lay judge system violates the due process clause of the Fourteenth Amendment by authorizing non-lawyer judges to preside over criminal proceedings involving charges that carry the possibility of a jail sentence.

II. Whether permitting non-lawyer judges to preside over trials of criminal offenses punishable by a jail sentence is adverse to the public interest.

STATEMENT OF CASE

The American Judicature Society adopts Appellant's statement.

SUMMARY OF ARGUMENT

Kentucky's lay judge system, insofar as it authorizes non-lawyer judges to preside over criminal proceedings involving charges that carry the possibility of a jail sentence, violates the due process clause of the Fourteenth Amendment. An accused's right to counsel is rendered meaningless when he is tried before a non-lawyer judge. This Court's extension of the right to counsel as enunciated in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), applies to all criminal trials wherein the accused faces the possibility of incarceration. But if the right to counsel is to remain intact, this Court must recognize the concomitant right of an accused to a lawyer judge in criminal proceedings involving charges that carry the possibility of a jail sentence.

The increased complexity of the criminal law has produced a change of conditions which now makes the requirement of a judge trained in the law a constitutional necessity in order to insure an accused a fair trial. In addition, a critical safeguard to an individual's liberty is the assurance that judges who preside over criminal proceedings involving charges that carry the possibility of imprisonment be trained in the law. Empowering non-lawyer judges to incarcerate not only impairs the quality of judicial administration but diminishes the public's image of the judiciary. A decision by this Court requiring a lawyer judge in every criminal case where a term of imprisonment may be imposed will not disrupt the orderly administration of justice in the state court systems. Rather, such a decision will enhance the assurance of justice for the accused who faces the possibility of imprisonment and improve the quality of judicial administration.

ARGUMENT

I.

KENTUCKY'S LAY JUDGE SYSTEM VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY AUTHORIZING NON-LAWYER JUDGES TO PRESIDE OVER CRIMINAL PROCEEDINGS INVOLVING CHARGES THAT CARRY THE POSSIBILITY OF A JAIL SENTENCE.

A. Permitting Non-Lawyer Judges To Preside Over Trials Of Criminal Offenses Punishable By A Jail Sentence Jeopardizes An Accused's Fundamental Right To A Fair Trial And Effectively Denies Him His Right To Counsel.

Starting with *Powell* v. *Alabama*, 287 U.S. 45 (1932), and continuing through *Gideon* v. *Wainright*, 372 U.S. 335 (1963), and *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court has confirmed and reaffirmed the fundamental right of an accused to the assistance of counsel. In *Powell*, the Court based the right to counsel on the inability of an accused to defend himself effectively. Mr. Justice Sutherland wrote:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. 287 U.S. at 68-69.

Justice Sutherland's analysis was quoted with approval in *Gideon*, 372 U.S. at 344, 345 and *Argersinger*, 407 U.S. at 31.

An accused's right to counsel is rendered meaningless when he is tried before a non-lawyer judge. If "intelligent and educated laymen" lack skill in the "science of the law" such laymen serving in a judicial capacity suffer from a similar disability. Just as an accused who faces the possibility of imprisonment is denied due process when deprived of counsel, so an accused is denied due process if a trial judge by virtue of his lack of legal training does not know the law and is unable to interpret and apply the arguments of counsel. An attorney cannot effectively defend his client in a criminal proceeding before a non-lawyer judge who has not been trained either to understand an attorney's role in the legal process or appreciate the import of the legal arguments presented.

Unlike Justice Sutherland's layman, an accused's counsel, by virtue of his training and licensure, is presumed to know whether an indictment is good or bad, is presumed familiar with the rules of evidence, and can be expected to object to incompetent or irrelevant evidence. But if a judge cannot understand or discern the impact of counsel's arguments, an accused's "right to be heard" is of little avail. Clearly, the right to a judge trained in the law is an essential element of due process, and an accused is deprived of a fair trial and is denied due process if a non-lawyer judge is allowed to preside at his trial.

This Court's extension of the right to counsel as enunciated in *Argersinger* applies to all criminal trials wherein the accused faces the possibility of incarceration. But if the right to counsel is to remain intact, this Court must

recognize the concomitant right of an accused to a lawyer judge in criminal proceedings involving charges that carry the possibility of a jail sentence. Recognizing the inherent unfairness of allowing non-lawyer judges to preside over trials of criminal offenses punishable by a jail sentence, the Supreme Court of California has held this practice unconstitutional. *Gordon* v. *Justice Court for Yuba Judicial District of Sutter County*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975). The court recognized that the increased complexity of the criminal law has produced a change of conditions which now makes the requirement of a judge trained in the law a constitutional necessity.

Kentucky's lay judge system also makes it folly for an accused to exercise his constitutional right to defend himself. In *Faretta* v. *California*, ... U.S. ....., 95 S. Ct. 2525 (1975), this Court held that a defendant's Sixth Amendment right to counsel necessarily implied the right of an accused to conduct his defense personally. While leaving the theoretical basis of the right to counsel cases unchanged, *Faretta* suggests a corollary right: the right of a defendant who chooses to defend himself to be tried before a judge who is trained in the law. To interpret *Faretta* otherwise in the context of a lay judge system like Kentucky's would negate the safeguards traditionally inherent in conducting one's own defense. A primary rationale for permitting an accused to represent himself at trial is that the presiding judge can and will protect his rights so that justice will prevail. But, for the most part, non-lawyer judges, by definition, cannot do so because of their unfamiliarity with the law. In such a situation the entire criminal proceeding is stripped of legal content.

A defendant who seeks permission to represent himself should still be "made aware of the dangers and disadvantages of self-representation." 95 S. Ct. at 2541. But unless a lay judge believes that his own lack of training in the law will endanger the right of a defendant and so warns him, a defendant probably will be unaware that the judge actually is a layman. Thus, a defendant might go to trial not knowing that the only lawyer in the courtroom is his adversary, the prosecuting attorney. What is more a lay judge is prone to rely on the judgment and advice of the prosecutor, believing that he has legal expertise. Studies of non-lawyer justice of the peace courts have shown that these courts rarely released a defendant after a "probable cause" hearing because the "only source consistently available to explain issues to JPs are the police and the district attorney and most JPs consequently are very prosecutor-oriented." See Hazard, Justice Courts In Oregon, 53 Ore. L. Rev. 407, 430 (1974). Such a situation is fundamentally unfair.

As this Court pointed out in *Faretta*, if a defendant decides to represent himself at trial, the consequences of the decision are limited to that one trial and that one defendant. 95 S. Ct. at 2541. In fact, even wantonly depriving an accused of counsel denies due process only in that one case. But an untrained, unskilled, non-lawyer judge can deny a fair trial to all who appear before him.

B. Permitting Non-Lawyer Judges To Preside Over Trials Of Criminal Offenses Punishable By A Jail Sentence Jeopardizes An Individual's Fundamental Right To Liberty.

In *Argersinger*, this Court underscored the necessity for insuring a fair trial even in prosecutions for petty offenses.

The Court was not convinced that the complexity of the legal and constitutional questions involved in a case increased in proportion to the seriousness of the offense. As an example, the Court cited the trial of vagrancy cases. "While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions," the Court stated. 407 U.S. at 33.

In light of *Argersinger* and recent decisions dealing with civilly committed patients, juvenile delinquents and dangerous sexual offenders, we believe due process requires that lawyer judges preside over criminal proceedings involving charges that carry the possibility of a loss of freedom of any duration. Drawing analogies from the criminal law in cases involving the deprivation of an individual's liberty, this Court has ruled that states cannot commit or imprison citizens arbitrarily. Due process safeguards must be assured either at trial or at any other proceeding wherein an individual's freedom is at issue. See *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *Jackson* v. *Indiana*, 406 U.S. 715 (1972); and *O'Connor* v. *Donaldson*, ... U.S. ....., 95 S. Ct. 2486 (1975).

The Court emphasized in *Gault* that the risk of imprisonment required procedural safeguards. In view of the fact that a juvenile could be "restrained of liberty for years" where his world would become "a building with whitewashed walls, regimented routine and institutional hours," the Court thought it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process'." 387 U.S. at 27, 28.

In *Winship*, the Court noted that proof beyond a reasonable doubt in criminal trials protected both the majesty of the criminal law and the accused against the possibility

of being jailed unjustly. 397 U.S. at 364. Despite the fact that the proceedings in *Winship* were characterized as "civil", the Court stressed that the individual's potential loss of liberty entitled him to stringent safeguards.

Similarly, in the context of other non-criminal areas, this Court frequently has emphasized that the risk of confinement requires procedural safeguards. In *Jackson*, the petitioner was a 27-year old deaf mute with the mental level of a pre-school child. Charged with two robberies, he was judged incompetent to stand trial and committed until he was certified to be sane. The Court stressed that Jackson "was not afforded any 'formal commitment proceedings addressed to [his] ability to function in society' or to society's interest in his restraint or to the State's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment." 406 U.S. at 738. At the very least, the Court though due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which an individual is committed.

The Court has also confirmed that in cases involving civil commitment, a state must not only provide procedural safeguards but must have a compelling reason for depriving an individual of his liberty. In *O'Connor*, the respondent had been confined for almost 15 years in a state mental hospital and frequently had been denied release. Reasoning that confining the harmless mentally ill is like jailing the physically unattractive or socially eccentric, this Court held that a state could not "constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom." 95 S. Ct. at 2493-2494.

The thrust of all these cases is that incarceration of any kind is an awesome sanction never to be exercised arbitrarily or casually. As soon as an individual is threatened with the loss of his liberty, important constitutional safeguards must be activated. A critical safeguard to an individual's liberty is the assurance that judges who preside over criminal proceedings involving charges that carry the possibility of imprisonment be trained in the law. All the safeguards of the law are useless when placed in the hands of a judge who is untrained in the law. A judge who is trained in the law is, in many instances, the best safeguard against arbitrary deprivations of liberty. As this Court noted in *Gault:* "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." 387 U.S. at 18.

II.

PERMITTING NON-LAWYER JUDGES TO PRESIDE OVER TRIALS OF CRIMINAL OFFENSES PUNISHABLE BY A JAIL SENTENCE IS ADVERSE TO THE PUBLIC INTEREST.

A. Empowering Non-Lawyer Judges To Incarcerate Impairs The Quality Of Judicial Administration.

Critics of non-lawyer judges frequently cite the lack of qualifications of these judges, particularly their lack of legal training and their ignorance of judicial procedure. See Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System,* 14 (1971); Traynor, Rising Standards of Courts and Judges, 1965 J. of the State Bar of California 677, 690; Zimmerman, Courts — Justice of the Peace Courts — Recommendation 21 Ore. L. Rev. 380, 381 (1942); Hazard, Justice Courts In Oregon, *supra* at 428. The fact that non-lawyer

judges lack legal training and generally are ignorant of judicial procedure is detrimental to the administration of justice in their courts.

Each year large numbers of persons across the nation receive their first impressions of courtroom procedure in non-lawyer judge courts. But, for the most part, these courts fail to meet professional judicial standards. For example, in California prior to *Gordon* v. *Justice Court, supra,* some non-lawyer judges frequently boasted of their ignorance of the law, contending that their moral sense was sufficient to allow them to adjudicate correctly. See Ringwald, *Backwoods Justice,* Riverside California Press Enterprise, series of nine articles beginning December 8, 1968. In some cases, non-lawyer judges refused to apply the uniform bail system and to give jury trials because they were "too expensive." *Id.* Believing that the police arrested only guilty people, some non-lawyer judges gave unjustifiable weight to police testimony. *Id.*

There is also evidence that in California and Oregon many non-lawyer judges made little effort to provide counsel for indigent defendants, particularly those defendants charged with less serious offenses. Petition for Alternative Writ of Prohibition and Mandate at 14, 19, 20, *Gordon and Arguijo* v. *Justice Court,* No. 210521 (Sacramento County Superior Court, March 25, 1971); Hazard, Justice Courts in Oregon, *supra* at 426-28. Some non-lawyer judges frequently sentenced improperly. Petition for Alternative Writ of Prohibition and Mandate, *supra,* at 15-16; Hazard, Justice Courts in Oregon, *supra,* at 428. One non-lawyer judge did not even inform the defendant of the charges against him. Petition for Alternative Writ of Prohibition and Mandate, *supra,* at 14. Depositions of non-lawyer justices of

the peace in Mississippi indicate that the justices were unclear as to the extent of their criminal jurisdiction, unable to interpret the law, and incapable of following the rules of evidence when conducting a trial. Depositions of J. K. Bailey, John Sanders and Curtis Underwood, August 28, 1973, *Brown* v. *Vance*, Civil Action No. 72J-91(N) (Consolidated) (S.D. Miss.-Jackson Div., 1973).

The shortcomings of non-lawyer judges are not unique to California, Oregon or Mississippi. Rather, they are inherent in any judicial system staffed by non-lawyer judges. Because of their lack of legal knowledge, non-lawyer judges are incapable of making legal decisions. For example, they cannot deal with challenges to their court procedures. Petition for Alternative Writ of Prohibition and Mandate, *supra*, at 15. Often they are grossly uninformed on criminal law, and consequently sanction inappropriate arrest and search and seizure practices. *Id.* Often they are ignorant of federal and state constitutional requirements and impose self-made and unduly harsh tests of indigency in considering whether or not to appoint counsel. See Hazard, Justice Courts in Oregon, *supra* at 426. Non-lawyer judges not only have difficulty understanding the penalty procedures of their state laws but often there is no procedure for informing them on the subject. *Id.* at 428.

The consequences of these shortcomings are inefficiency and injustice in non-lawyer judge courts, both flowing directly from arbitrary decisions often made by non-lawyer judges, requiring a defendant to appeal his case in order to receive a just adjudication pursuant to law. This ought not to be necessary. The right of appeal and trial *de novo* does not cure the constitutional defect caused by the failure to provide an adequate trial court tribunal in the first

instance. What avail is it that an accused may be able to get more even-handed justice six months or a year hence in another tribunal, after long months of anxious waiting, the expenditure of a great deal of funds, and perhaps even imprisonment? See Keebler, Our Justice of the Peace Courts — A Problem In Justice, 9 Tenn. L. Rev. 1, 4 (1930).

An undue burden is placed upon a defendant when he must bear the expense and inconvenience of an appeal in order to receive a fair trial before a qualified and impartial judge. While a trial *de novo* undoubtedly will correct errors committed in a lay judge court, the "protection afforded by such an appeal can be illusory because it is not realistically available to everyone." See Note, Constitutional Challenge to the Justice of the Peace Court in Mississippi, 44 Miss. L.J. 996, 1007 (1973). The vast majority of defendants who appear in lay judge courts have neither the knowledge nor the funds to prosecute an appeal. See Note, The Justice of the Peace Courts in Florida, 18 U. Fla. L. Rev. 109, 118-119 (1965). For these defendants the decision of an uneducated and often uninformed judge usually constitutes the end of their case.

But even where only a very small percentage of defendants seek a trial *de novo*, such requests invariably clog the courts of general jurisdiction with unexpected and unwanted litigation. In addition, the trial *de novo* system contradicts sound canons of judicial administration by shielding the work of lay judge courts from appellate review. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report*: *Courts* 162 (1973); See also Bing and Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston, 7 Crim. L. Bull. 393, 404 (1971). Thus, the trial *de novo*,

which is a concomitant characteristic of a predominantly lay judge lower court system, is inefficient and costly, both for individual defendants and the society at-large.

The inefficiency and injustice of a lay judge system are magnified in cases where a defendant is faced with the possibility of incarceration. Our criminal justice system provides numerous substantive and procedural safeguards to insure that a criminal defendant is not denied his liberty except by due process of law. But many non-lawyer judges are incapable or unwilling to apply these safeguards. The result is injustice for the person incarcerated who is too poor or ignorant to appeal and judicial inefficiency and waste for a person who exercises his right for a completely new trial.

B. Empowering Non-Lawyer Judges To Incarcerate Diminishes The Public's Image Of The Judiciary.

The administration of justice in our Nation's courts of limited jurisdiction poses the greatest challenge to proponents of court reform. As the President's Commission on Law Enforcement and Administration of Justice found, these courts are "lower only in the sense that they are the courts before which millions of arrested persons are first brought, either for trials of misdemeanors or petty offenses or for preliminary hearing on felony charges." See President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 29 (1967). Although the offenses which are the "business of the lower courts" may be "petty" in respect to the amount of damage they do and the fear that they inspire, the Commission believed that the work of these courts had great implications. *Id.* The Commission noted that insofar as the citizen ex-

periences contact with the criminal court, "the lower court is usually the court of last resort . . . 90 percent of the Nation's criminal cases are heard in the lower courts." *Id.*

Despite the importance of the limited jurisdiction courts, these are the courts where practically all non-lawyer judges serve. This practice generally is defended on a variety of grounds, including the high volume of cases handled by these courts, the necessity of handling these cases rapidly, the lack of law trained judges in the area and the erroneous belief that the disposition of misdemeanors is not an important or demanding judicial function. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts* 161 (1973). Yet clearly it is in these courts that the public's initial impression of the judiciary usually is forged. If the courts of limited jurisdiction fail to inspire the respect of the public for the judiciary, public fidelity to the law is necessarily impaired. Incarceration by a non-lawyer judge following a proceeding that violates both the spirit and the substance of the law can only undermine respect for the judiciary.

Many organizations have called for the professionalization of the judiciary. See, e.g., The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 36 (1967); Consensus Statement of the National Conference on the Judiciary, 59 J. Amer. Jud. Soc. 29, 30 (1971); Advisory Commission on Intergovernmental Relations, *State-Local Relations in the Criminal Justice System,* Recommendation 21 (1971); National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts,* Standard 8.1 (1973); A.B.A. Commission On Standards Of Judicial Administration, *Court Organization* §1.21 (1974). Proper legal training for all judges is vital if the public's image of the

judiciary is to be enhanced. Untrained, or inadequately trained, non-lawyer judges damage the very legitimacy of the lower trial courts.

C. Empowering Non-Lawyer Judges To Incarcerate Cannot Be Justified By Necessity And Is Contrary To The Present Trend.

Lay judge courts must be understood in their historical context. When these courts were created, centralized administration of justice was difficult because of slow communications and transportation. As a result, each community had its own justice of the peace or city judge. Convenience and ready access to the courts were given a higher priority than judicial competence. See National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Courts* 161 (1973); Note, The Justice of the Peace In Virginia: A Neglected Aspect of the Judiciary, 52 Va. L. Rev. 151 (1966).

But today, even in courts of limited jurisdiction in areas with small populations and where fiscal resources and caseloads appear too small to warrant full-time lawyer judges, judicial incompetence need not be the price a court system pays for convenience. Improved methods of transportation and communication now make it possible for states to create a court system that will guarantee a lawyer judge to every accused faced with the possibility of incarceration. Changing jurisdictional boundaries, removing residency requirements, and utilizing "circuit-riding" lawyer judges are options available to all states to insure the availability of sufficient lawyer judges.

The national trend in court modernization is towards the creation of unified state court systems with a professionalized judiciary. See Appendix: Survey of States Professionalizing Their Judiciary. More and more states are recognizing that the vast range of important judicial responsibilities assigned to courts of limited and special jurisdiction require lawyer judges. See Sixth Illinois Constitutional Convention, Record of Proceedings, v. VI, Part 1, 828-30 (1969-70); C. Joiner, The Michigan Constitution and the Judiciary 22, Michigan Constitutional Convention Studies, (1961); Oklahoma Crime Commission, Comprehensive Law Enforcement Action Plan B-13 (1972). These states are finding ways to staff all their courts with lawyer judges.

To say that non-lawyer judges should not be able to incarcerate is not to say that there is no proper role for the non-lawyer in the judiciary. For example, Alabama, Connecticut, Maryland and New Jersey allow non-lawyers to act as probate court judges. See Appendix, *supra*. Colorado, Ohio and New Jersey allow non-lawyer judges to hear cases involving municipal ordinance violations but do not allow them to incarcerate. *Id.* In Nebraska, non-lawyer associate judges act as clerks for circuit-riding lawyer judges and handle routine cases. *Id.* In California, non-lawyer justice court judges sit in all justice court cases except when a criminal defendant exercises his right to an attorney judge. *Id.* In Virginia, magistrates assist the professionalized judiciary by presiding over preliminary felony hearings. *Id.* Clearly, the non-lawyer can play an important role in judicial administration. However, he ought not to preside over any proceeding wherein an accused faces the possibility of incarceration.

In several states where incarceration by non-lawyer judges is permitted, the practice is under attack. On June 27, 1975, the Tennessee Court of Appeals ruled that only at-

torney juvenile judges could incarcerate juvenile offenders. *Tennessee* v. *Williams,* Coffee Law (Ct. App.—Nashville, decision filed June 27, 1975). The court found, *inter alia,* that to guarantee the right to counsel without also giving the defendant the right to an attorney judge was inherently inconsistent. The court also concluded that because of the complexity of legal proceedings involving the possibility of incarceration, allowing non-lawyer judges to preside over them was likely to result in prejudice. *Id.* at 6. Clearly, it is implausible for Tennessee to guarantee juvenile defendants a lawyer judge when it allows non-lawyer judges to incarcerate adult criminal defendants. It is likely that this case will be the first in a series of challenges to the authority of non-lawyer judges in Tennessee to incarcerate.

On June 8, 1975, an intermediate appellate court in Utah ruled that non-lawyer judges cannot impose imprisonment upon a conviction of offenses over which they otherwise have jurisdiction. *Shelmidine* v. *Jones,* No. 224948 (3rd Dis., decision filed June 8, 1975) *appeal docketed,* No. 14152, Utah Sup. Ct., June 19, 1975. The Utah state legislature is in the process of enacting supportive legislation providing for transfer of criminal cases brought before non-lawyer judges to the nearest or most convenient court presided over by a lawyer judge. H.B. No. 1, 1975 First Special Session.

In New Hampshire, a case challenging the constitutionality of incarceration by non-lawyer judges currently is pending before the state's supreme court. *Jenkins* v. *Canaan Municipal Court,* No. 7230 (Sup. Ct., filed July 16, 1975). In Wyoming, the authority of non-lawyer justices of the peace to conduct preliminary hearings in felony cases was recently upheld by the Wyoming Supreme Court. *Thomas*

v. *Justice Court of Washakie,* No. 4538 (Sup. Ct., decision filed July 14, 1975). But the court specifically did not reach the question of whether a non-lawyer justice of the peace could incarcerate, distinguishing the case on the grounds that the preliminary examination was a more informal and less complex proceeding than a trial. *Id.* at 6, 8.

The attack on non-lawyer judges is not limited to the courts. Recently, North Dakota's state legislature passed a resolution creating a proposed new judicial article for the state constitution. The proposed judicial article would unify the state's court system and require supreme court and district court judges to be lawyers. H. Concurrent Res. No. 3056, §94 (44th Leg. Ass., 1975). In North Carolina, a state constitutional amendment was proposed requiring that all judges be lawyers. S.B. 260 (Sess. 1975).

These developments strongly suggest that the professionalization of the judiciary is an area of urgent national concern. This court not only bears the prime responsibility for providing leadership in upgrading the quality of the judiciary, but it must provide specific, positive guidance in this area to the state. The rights of many individuals may be denied if the states are allowed to do nothing, or to move haphazardly, towards providing competent judges for criminal defendants who are faced with the possibility of imprisonment.

D. Providing A Lawyer Judge Whenever A Defendant Is Faced With The Possibility Of Incarceration Would Not Be Difficult To Implement.

A decision by this Court requiring a lawyer judge in every criminal case where a term of imprisonment may be imposed will not disrupt the orderly administration of justice

in the state court systems. The experience of California under the mandate of its supreme court decision in *Gordon* v. *Justice Court, supra,* indicates that it is possible to provide lawyer judges for criminal defendants facing the possibility of incarceration without disrupting the administration of justice. See Appendix, *supra.*

Even in sparsely populated rural areas, California now provides an attorney judge for all criminal defendants who face possible imprisonment and who choose to exercise their right to an attorney judge. The implementation of the *Gordon* decision did not even require the creation of new judgeships or the appointment of new personnel. Certification of incumbent attorney justice court judges proved sufficient to meet the requirements of *Gordon.* See Appendix, *supra.*

The experiences of Nebraska and Oklahoma also suggest that it is possible to provide lawyer judges even in states which have large areas with low population. Nebraska provides for circuit-riding lawyer judges supported by non-lawyer associate judges. The associate judges hear only routine, uncontested cases. See Appendix, *supra.* Oklahoma allows a non-lawyer to be certified as a Special Judge only when no lawyer candidate for the judgeship can be found. In all of Oklahoma, there is only one non-lawyer Special Judge. See Appendix, *supra.*

CONCLUSION

In large measure the quality of justice depends upon the quality of judges. It is now apparent that requiring a lawyer judge to preside over a trial where an accused faces the possibility of imprisonment does not disrupt the criminal justice process. Rather, it enhances the assurance of justice for the accused while improving the quality of judicial administration. For the reasons stated we respectfully submit that the judgment of the Court of Appeals of Kentucky in this case be reversed.

Respectfully submitted,

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August 6, 1975

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APPENDIX

SURVEY OF STATES PROFESSIONALIZING THEIR JUDICIARY

Introduction

Based on preliminary research conducted by the American Judicature Society in 1974, the Society conducted a telephone survey during July 1975 of those states which are in the process of professionalizing their judiciary or which already have a completely professionalized judiciary. The Society interviewed state court administrators of nineteen states for this purpose.

ALABAMA

(Information acquired from Charles Cameron, Court Administrator)

Alabama recently passed an amendment to the state constitution which requires that all judges be lawyers, with the exception of probate court judges, who are essentially administrators and do not have the power to incarcerate. Ala. Const. art. 6, §§ 145, 146. All requirements as to judicial qualifications will become effective by January, 1977. Currently, Alabama has a total of 200 state court judges and 387 municipal court judges. Of these, 30 state court judges are non-lawyers. (There is no information on the number of municipal court judges who are non-lawyers.)

CALIFORNIA

(Information acquired from Eugene Kaster, Administrative Office of the Courts)

California has 1,165 judgeships; 66 of these positions are vacant and 109 are occupied by non-lawyer judges who are in the justice courts of 41 counties. The California Supreme Court decision in *Gordon* v. *Justice Court for Yuba Judicial District of Sutter County*, 12 Cal. 3d 323, 525 P. 2d 72, 115 Cal. Rptr. 632 (1974) held that whenever a criminal defendant is faced with the possibility of incarceration, he has a right to a lawyer judge. The California legislature responded to the decision with supportive legislation in the form of a transitional plan to operate the justice courts for a two-year period during which a comprehensive reorganization of the justice courts could be undertaken. Cal. Gov. Code §§ 71700-71704 (West 1970). The transitional plan authorized the Chief Justice of the California Supreme Court to certify any attorney judge of a justice court for five years as a circuit justice court judge if he agreed to give up his law practice. Cal. Gov. Code § 71702(a) (West 1970). This circuit justice court judge sits in his home county and others nearby when defendants exercise their right to an attorney judge. Cal. Gov. Code §§ 71702, 71704 (West 1970). The legislation also provides for the Judicial Council to make findings of necessity for a particular justice court district; a new judgeship is thereby created and the judge is appointed by the governor. Cal. Gov. Code §71700 (West 1970). This provision has not been utilized since the certification of incumbents has been found to be more efficient. The transitional plan has not been much more expensive to administer than the previous non-lawyer judge system. The only new expenses have been the salaries of the circuit justice

court judges and the justice court coordinator who organizes their schedules.[1] The California legislature is currently considering a proposed comprehensive plan to take the place of the transitional one.

The new system has not disrupted law enforcement. Police departments do not report any difficulty in obtaining search warrants or preliminary felony hearings, both areas formerly within the jurisdiction of the non-lawyer judge. All judges not in the justice courts in California are lawyers. Cal. Const. art. VI, § 15.

COLORADO

(Information acquired from Harry O. Lawson, Court Administrator)

In Colorado, all judges must be lawyers, except county court judges in counties of low population and municipal court judges. Colo. Const. art. VI, §§ 8, 11. Of the 107 county court judges, approximately 25 are non-lawyers; the non-lawyer judges handle approximately 3% of all county court cases. Of the 168 municipal court judges, 118 are non-lawyers. The non-lawyer judges are all part-time and handle primarily traffic violations.

The transition to a professionalized judiciary in Colorado took place over a period of three years after the constitutional amendment of 1962. The number of judicial personnel was reduced drastically; specifically, 250 justices of the peace were eliminated. Two judicial committees drew new district boundaries to place lawyer judges within each district. The trial *de novo* procedure for ap-

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[1] Total budget estimate for 1975-76: $1.5 million.

peal out of the lowest courts was abolished and the rate of appeals dropped by 50-60% thereafter. The new system did not disrupt law enforcement. Police departments report no difficulty in obtaining search warrants or preliminary felony hearings despite the reduction in the number of judicial personnel.

CONNECTICUT

(Information acquired from Justice John Cotter, Chief Court Administrator)

In 1961, Connecticut abolished its justices of the peace, town and city courts, thereby abolishing all non-lawyer judicial positions in Connecticut and replacing them with an all lawyer judge circuit court. Conn. Gen. Stat. Ann. § 51-47 (1960). All of Connecticut's 246 judges are lawyers, except probate court judges who are not required to be lawyers. Conn. Gen. Stat. Ann. § 45-6 (1960). However, probate court judges are essentially administrators who admit uncontested wills to probate and administer them. In the case of a will contest, there is always a transfer for trial *de novo* to the superior court. Conn. Gen. Stat. Ann. § 45-288 (1960); *McKinnon* v. *Burke*, 25 Conn. Supp. 285, 203 A.2d 85 (1964).

The transition to a fully professionalized judiciary was smooth and did not disrupt law enforcement. Police departments reported no difficulty in obtaining search warrants or preliminary felony hearings after the abolition of justices of the peace, town and city courts, since there are judges available 24 hours a day.

DISTRICT OF COLUMBIA

(Information acquired from Arnold M. Malech, Executive Officer, D.C. Courts)

All judges in the District of Columbia must be members of the District of Columbia Bar. D.C. Code Encycl. Ann. § 11-1501(b) (Supp., 1970).

HAWAII

(Information acquired from Lester E. Cingcade, Administrative Director of the Courts)

All judges in Hawaii are required by law to be attorneys. Haw. Const. art. V, §3.

ILLINOIS

(Information acquired from William Madden, Administrative Office of the Courts)

A constitutional amendment passed in 1970 made bar membership a requirement for all judicial offices including magistrates. Ill. Const. art. VI, §11. Prior to the constitutional amendments of 1964 (unifying the court system) and 1970 (requiring bar membership for judges), Illinois had more than 1800 judges, justices of the peace and police magistrates. Today, the state has only 665 judges and all but 12 are lawyers. The 12 non-lawyers are associate judges appointed by the circuit court judges under a "grandfather" clause in the 1970 constitution making it possible for former justices of the peace and police magistrates to serve as appointed associate judges. Ill. Const. art. VI, § 11. As of 1971, no one could become a judge in Illinois who was not a licensed attorney.

The transition to a fully professionalized judiciary has been smooth with no disruption of law enforcement despite the reduction in the number of judicial personnel. The state has adopted procedures to make judges accessible at all times to law enforcement officials by having a bond court with judges available 24 hours a day.

MAINE

(Information acquired from Charles Rodway, Administrative Assistant to the Chief Justice)

In 1961, Maine professionalized its judiciary by a statutory provision requiring all judges to be members of the state bar. Me. Rev. Stat. Ann. tit. 4, § 157 (1964). The transition to a fully professionalized judiciary was smooth and inexpensive; 20 full-time lawyer judges replaced 30 part-time non-lawyer judges with no disruption of law enforcement. Today, all of Maine's 56 judges are lawyers.

Under the all-lawyer judge system, the rate of appeals has decreased since the common practice had been to appeal all convictions from part-time non-attorney judge courts to full-time lawyer judge courts.

MARYLAND

(Information acquired from William H. Adkins, II, Director, Administrative Office of the Courts)

Maryland professionalized its judiciary by constitutional amendment in 1970 requiring all judges to be lawyers. Md. Const. art. IV, §2. Today, all 186 Maryland judges are lawyers, excluding those in the orphans' court which is the probate court of Maryland. Md. Const. art. IV, § 40. Of the 66 judges in the probate court, the majority are non-lawyers. However, probate court judges are primarily administrators and do not have power to incarcerate.

The transition to a fully professionalized judiciary was smooth with no disruption of law enforcement. The transition was also relatively inexpensive. Although it required an initial outlay of $10 million by the state, the unified, professionalized court system more than pays for itself; the state recovers a $2-4 million profit annually. Moreover, since the judiciary has been professionalized, the rate of appeals has dropped by approximately 50%.

MASSACHUSETTS

(Information acquired from Executive Secretary, Supreme Judicial Court, in response to mailed questionnaire - February 6, 1974)

By tradition, all judges in Massachusetts are attorneys although there are no statutory or constitutional requirements of bar membership for judges. The state has no non-lawyer judges.

MICHIGAN

(Information acquired from John Mayer, Office of the Court Administrator)

In 1963, Michigan began professionalizing its judiciary by abolishing the office of justice of the peace. Mich. Const. art. 6, § 26. Two hundred district court judges replaced more than 1000 justices of the peace. Today, all judges in Michigan must be members of the state bar. Mich. Const. art. 6, § 19 (supreme court, court of appeals, circuit court, probate court and other courts of record); Mich. Const. art. 6, § 20 (probate court); Mich. Comp. Laws Ann. § 728.3 (1968) (court of common pleas in Detroit); Mich. Comp. Laws Ann. § 600.8201 (1968) (district court).

Today, of Michigan's 485 judges, all but five are lawyers. The five non-lawyer judges are in the probate court by a "grandfather" clause in the 1963 state constitution. Mich. Const. art. 6, § 26. Their jurisdiction is more limited than that of lawyer probate court judges in that they may not be assigned as circuit court judges whereas lawyer probate court judges may. Mich. Const. art. 6, § 19.

The transition was smooth without disruption of law enforcement. The rate of appeals in the district court has been greatly reduced since the professionalization of the judiciary.

MINNESOTA

(Information acquired from Richard E. Klein, Court Administrator)

All judges in Minnesota are required to be members of the bar. Minn. Const. art. VI, § 7; Minn. Stat. Ann. § 487.03, Subdiv. 1 (1971). Today, of Minnesota's 211 judges, only five are non-lawyers; these five sit in the county probate court by virtue of a "grandfather" clause in the law. Minn. Stat. Ann. § 487.03 Subdiv. 1 (1971). The jurisdiction of non-lawyer judges, such as justices of the peace, consists only of taking pleas of guilty in cases of traffic violations and presiding over uncontested civil cases where less than $100 is at issue. Minn. Stat. Ann. § 487.04 (1971).

The transition to a professionalized judiciary was smooth and law enforcement was not disrupted.

NEBRASKA

(Information acquired from James E. Dunlevy, Court Administrator)

In 1973, Nebraska professionalized its judiciary during a major court reorganization. All judges must be members

of the state bar. Neb. Const. art. V, §21 (supreme court); Neb. Const. art. V. §27 (courts of general jurisdiction); Neb. Rev. Stat. § 43-233.02 (Supp., 1972) (juvenile courts); Neb. Rev. Stat. § 24-301 (Supp., 1972) (district judges); Neb. Rev. Stat § 24-505 (Supp., 1972) (county court judges).

Nebraska handles any problems due to shortage of lawyer judges with a "circuit-riding" plan. Each of the 93 county courts is staffed by an associate judge who need not be a lawyer. Neb. Rev. Stat. § 24-508 (Supp., 1972). The associate judges act primarily as clerks of court for 43 attorney judges who are organized in the state's 21 judicial districts. The associate judges handle only administrative matters and uncontested routine cases. Neb. Rev. Stat. § 24-511 (Supp., 1972).

The court reorganization and professionalization eliminated approximately 100 justices of the peace, 300 police court judges, and 93 county court judges, none of whom were attorneys. Although Nebraska now has only 197 judges, law enforcement has not been disrupted. The transition was smooth and the new "circuit-riding" system works well.

NEW JERSEY

(Information acquired from Judge A. J. Simpson, Jr., Acting Administrative Director of the Courts)

By law, all judges in New Jersey must be members of the bar. N.J. Const. art. 6, § 2, para. 6 (supreme court, superior court, and county district courts); N.J. Rev. Stat. § 2A-6-8.1 (1952) (juvenile and domestic courts); N.J. Rev. Stat. § 2A-8-7 (1952) (municipal court). Of 292 full-time judges and 398 part-time municipal court judges, all but 10 are lawyers. The 10 non-lawyer judges sit in the mu-

nicipal courts and are authorized by a "grandfather" clause in the law. N.J. Rev. Stat. § 2A-8-7 (1952).

While judges in the surrogate court are not required to be lawyers, these judges are essentially bonded, quasi-judicial officers who act as clerks of the probate court which is the county district court. N.J. Rev. Stat. § 2A-5-1 (1952). They are authorized only to admit wills to probate where the wills are routine and uncontested. N.J. Rev. Stat. § 2A-5-17 et seq. (1952).

The role of the remaining non-lawyer judges in the municipal courts is sharply limited. They may not handle preliminary felony hearings nor take a waiver of indictment and jury trial to try a case.

The transition to a fully professionalized judiciary was smooth and law enforcement was not disrupted in any way.

OHIO

(Information acquired from the Office of the Administrative Director of the Courts)

Ohio law requires all judges to be lawyers. Ohio Rev. Code Ann. § 2503.01 (Page 1953) (supreme court); Ohio Rev. Code Ann. § 2501.02 (Page 1953) (court of appeals); Ohio Rev. Code Ann. § 2101.02 (Page 1953) (probate court); Ohio Rev. Code Ann. § 2151.07 (Page 1953) (juvenile court); Ohio Rev. Code Ann. § 2301.01 (Page 1953) (court of common pleas); Ohio Rev. Code Ann. § 1901.06 (Page 1968) (municipal court); Ohio Rev. Code Ann. § 1907.051 (Page 1968) (county courts). Of Ohio's 594 judges, only three are non-lawyers. The three non-lawyers sit in the county court and are authorized by a "grandfather" clause in the law. Ohio Rev. Code Ann. § 1907.051 (Page 1968).

Although there are approximately 600 mayor's courts which do not have a bar membership requirement for judicial eligibility, mayor's courts cannot incarcerate since they have jurisdiction over traffic violations only. Ohio Rev. Code Ann. § 1905.01 et seq. (Page 1968); Ohio Rev. Code Ann. § 1907.031 (Page 1968).

The transition to a fully professionalized judiciary was smooth, since it took place over a period of 38 years. There was no disruption of law enforcement.

OKLAHOMA

(Information acquired from Marian Opala, Administrative Director of the Courts)

Oklahoma law requires bar membership for eligibility for a judgeship. Okla. Const. art. 7, § 2 (supreme court); Okla. Const. art. 7, § 3 (court of criminal appeals); Okla. Stat. Ann. tit. 20, § 30.9 (1962) (intermediate court of appeals); Okla. Const. art. 7, § 8(g) (district court). Oklahoma law provides specially for any occasion when a lawyer candidate for a district court judgeship cannot be found that a non-lawyer may be appointed as a Special Judge. Okla. Const. art 7, § 8(h). The criminal jurisdiction of the non-lawyer Special Judge is limited to misdemeanors punishable by small fines and/or incarceration up to 30 days unless the Special Judge has the written consent of all the parties to hear the case. 20 O.S. 1972, § 123 (1974).

In spite of the fact that much of Oklahoma is sparsely populated, only one of Oklahoma's 203 judges is a non-lawyer judge under the Special Judge provision. Okla. Const. art. 7, § 8(h).

The professionalization and unification of Oklahoma's court system replaced 240 non-lawyer judges in courts of

limited jurisdiction with 44 lawyer magistrates. In spite of the reduction in personnel, the transition was smooth and there was no disruption of law enforcement.

RHODE ISLAND

(Information acquired from the Office of the Court Administrator)

Of Rhode Island's 36 judges, all are lawyers. By tradition, all judges are lawyers.

SOUTH DAKOTA

(Information acquired from Ellis Pettigrew, State Court Administrator)

South Dakota is currently in the process of professionalizing its judiciary pursuant to the rule-making power of the supreme court. S.D. Const. art. V, § 12. Currently, South Dakota has 108 non-lawyer judges all of whom sit in courts of limited jurisdiction. The transition will be carried out on a circuit by circuit basis over a period of three years. At the moment, only one judicial circuit has been completely professionalized.

VIRGINIA

(Information acquired from the Office of the Executive Secretary, Supreme Court of Appeals)

Recent changes in Virginia law require that all judges be lawyers. Va. Code Ann. § 16.1-69.15 (Supp., 1975). Of Virginia's 272 judges, only 4 are non-lawyers. These 4 judges sit in the district court and juvenile court as part-time judges by virtue of a "grandfather" clause in the law. Va. Code Ann. § 16.1-69.9 (Supp., 1975).

The transition to a fully professionalized judiciary has been smooth. Law enforcement has not been disrupted by the transition because Virginia's judges are assisted by approximately 360 committing magistrates who are not required to be lawyers. Va. Code Ann. § 19.1-378 (Supp., 1975); Va. Code Ann. § 19.1-380 (Supp., 1975); Va. Code Ann. § 39.1-15 (1970).